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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ELMER AYALA FLORES, Defendant and Appellant.	B153551 (Super. Ct. No. GA044082)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph F. DeVanon, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On November 16, 2000, as part of a negotiated plea bargain, Elmer Flores pled no contest to stalking. (Pen. Code, § 646.9, subd. (a); all further section references are to the Penal Code.) Before Flores entered his plea, the following colloquy occurred: "[The prosecutor]: Mr. Flores, I also have to advise you of the immigration consequences. Though they may not apply to you, I am required to tell everyone about it. [¶] So, if you are not a citizen of the United States, your plea to this offense will result in deportation, denial of naturalization and exclusion from admission to the United States, pursuant to the laws of the United States. [¶] Do you understand that, sir? [¶] [Flores]: I understand." (Emphasis added.) Flores then waived his rights after proper advisements, entered his plea, and accepted the negotiated disposition.

As part of the bargain, the court suspended imposition of sentence and placed Flores on probation on condition, among others, that he serve 365 days in jail. Flores did not appeal from the judgment (order granting probation).

On September 5, 2001, Flores petitioned the trial court to modify his sentence by lowering his jail commitment to 364 days. Flores, then 32 years old, declared he had been a legal permanent resident since 1978, but now was subject to mandatory deportation under an INS rule that mandated deportation for any felony for which one served 365 or more days in custody. Flores also declared he later would be subject to criminal prosecution if he tried to return, which he could not legally do. Flores declared his trial counsel did not so advise him, and that he would not have pled had he known he would be deported. However, as noted, Flores sought only modification of his sentence.

Flores did not seek to withdraw his plea or have it set aside. Also on September 5, 2001, the trial court denied Flores' modification motion because the plea and sentence resulted from a plea bargain. Flores did not obtain a certificate of probable cause.

On October 2, 2001, Flores appealed from the order denying his modification motion, making the same argument presented to the trial court. We appointed counsel to represent Flores on this appeal. After examining the record, counsel filed a brief which "[p]ursuant to the opinion of the California Supreme Court in *People v. Wende* (1979) 25 Cal.3d 436, and . . . *Anders* [v. *California* (1967)] 386 U.S. 738, . . . request[ed] that [we] independently review the entire record on appeal in this case to determine whether the record reveals any issues which would, if resolved favorably to [Flores], result in reversal or modification of the judgment." Counsel listed one issue "to assist [us] in conducting its independent review of the record: [¶] 1. Whether the trial court erred by denying [Flores'] motion to modify his sentence?"

On February 5, 2002, we advised Flores he had 30 days within which to personally submit any contentions or issues he wished us to consider. To date, we have received no response.

As noted, Flores did not appeal from the judgment in which he was placed on probation on condition that he serve 365 days in jail. That judgment became final long before Flores sought to have his sentence modified. Moreover, Flores did not obtain a certificate of probable cause from the trial court.

As relevant, section 1237 states: "An appeal may be taken by the defendant: [¶] (a) From a final judgment of conviction except as provided in . . . Section 1237.5. A sentence[or] an order granting probation . . . shall be deemed to be a final judgment within the meaning of this section. . . . [¶] (b) From any order made after judgment, affecting the substantial rights of the party."

As relevant, section 1237.5 states: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk. . . . [¶] . . . ."

Thus, it is unclear whether Flores can appeal from the order denying his motion to modify his sentence. However, both below and on appeal, Flores filed his declaration stating his trial counsel did not tell him he unequivocally would be deported if he accepted a one-year sentence, and he would not have entered his plea had he so known. Under the circumstances, if Flores could not appeal the challenged ruling, we would construe his appeal as a habeas corpus petition. We thus address the merits of Flores' claim that the trial court erred in not modifying his sentence. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 976, 980-983.)

First, contrary to his claim in his declaration, before Flores pled, the prosecutor told him he would be deported if he was not a citizen. Flores said he understood, and then entered his plea. Assuming Flores' lawyer had not told him he would be deported, the prosecutor did so, and Flores said he understood. Thus, the record unequivocally shows Flores knew he would be deported if he was not a citizen. He nonetheless entered his plea. Flores does not claim his lawyer told him anything inconsistent with the advisement he received and said he understood in court. Thus, Flores has not alleged any affirmative misadvisement regarding his plea's immigration consequences. He has not demonstrated incompetence by his trial counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 235, 239-253; *id*., p. 255 (Mosk, J., conc. and dis. opn.).)

Moreover, Flores did not seek to withdraw or set aside his plea. Having already obtained a favorable plea bargain (the maximum sentence was three years in prison, and Flores also was on misdemeanor probation for terrorist threats at the time of the plea), Flores essentially asks to have his bargain made even more favorable than it already was. Having received the benefit of his bargain, Flores cannot now complain that the bargain should have been better still. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

In any event, the prosecutor properly advised Flores he would be deported if he was not a citizen. Thus, Flores was not entitled to have his plea set aside. (Cf. *In re Resendiz, supra*, 25 Cal.4th 230.)

Because the prosecutor told Flores of the certainty of deportation if he was not a citizen, and his trial counsel made no affirmative misadvisements arguably contradicting

the correct advisement, Flores suffered no prejudice from his trial counsel's alleged failure to provide the same warnings. (*In re Resendiz, supra,* 25 Cal.4th at pp. 253-254; *id*., p. 259, Brown, J., conc. and dis. opn.).)

For these reasons, the trial court properly denied Flores' modification motion.

We have examined the entire record and are satisfied Flores' attorney has fully complied with his responsibilities and no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

We affirm the challenged order.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.